



FR-4915-01-P

SURFACE TRANSPORTATION BOARD

[Docket No. EP 757]

Policy Statement on Demurrage and Accessorial Rules and Charges

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Statement of Board Policy.

SUMMARY: The Surface Transportation Board (STB or Board) is issuing this proposed policy statement to provide the public with information on principles the Board would consider in evaluating the reasonableness of demurrage and accessorial rules and charges. The Board seeks public comment on this proposed policy statement, and may revise it, as appropriate, after consideration of the comments received.

DATES: Comments on this proposed policy statement are due by November 6, 2019.

Reply comments are due by December 6, 2019.

ADDRESSES: Comments and replies may be filed with the Board either via e-filing or in writing addressed to: Surface Transportation Board, Attn: Docket No. EP 757, 395 E Street, S.W., Washington, DC 20423-0001. Comments and replies will be posted to the Board's website at www.stb.gov.

FOR FURTHER INFORMATION CONTACT: Sarah Fancher at (202) 245-0355.

Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: Demurrage is subject to Board regulation under 49 U.S.C. § 10702, which requires railroads to establish reasonable rates and transportation-related rules and practices, and under 49 U.S.C. § 10746, which requires

railroads to compute demurrage charges, and establish rules related to those charges, in a way that will fulfill national needs related to freight car use and distribution and maintenance of an adequate car supply.¹ Demurrage is a charge that both compensates rail carriers for the expense incurred when rail cars are detained beyond a specified period of time (i.e., “free time”) for loading and unloading and serves as a penalty for undue car detention to encourage the efficient use of rail cars in the rail network. See 49 C.F.R. § 1333.1; see also 49 C.F.R. pt. 1201, category 106.² Accessorial charges are not specifically defined by statute or regulation but are generally understood to include charges other than line-haul and demurrage charges. See Revisions to Arbitration Procedures, EP 730, slip op. at 7-8 (STB served Sept. 30, 2016).³

¹ The Board notes its authority to regulate demurrage includes, among other things, transportation under the exemptions set forth in 49 C.F.R. § 1039.11 (miscellaneous commodities exemptions) and § 1039.14 (boxcar transportation exemptions). See Savannah Port Terminal R.R.—Pet. for Declaratory Order—Certain Rates & Practices as Applied to Capital Cargo, Inc., FD 34920, slip op. at 7-8 (STB served May 30, 2008) (rejecting argument that the Board could not address demurrage dispute because of boxcar and certain commodity exemptions). In Exclusion of Demurrage Regulation from Certain Class Exemptions, Docket No. EP 760, served concurrently with this decision, the Board is proposing to revise 49 C.F.R. § 1039.10 to make the exemption for the transportation of agricultural commodities (except grain, soybeans, and sunflower seeds, which are already subject to the Board’s regulation) consistent with those exemptions.

² In Demurrage Liability (Demurrage Liability Final Rule), EP 707, slip op. at 15-16 (STB served Apr. 11, 2014), the Board clarified that private car storage is included in the definition of demurrage for purposes of the demurrage rules established in that decision. The Board uses the same definition for purposes of this policy statement.

³ As used in this policy statement, the term “accessorial charges” includes charges for diverting a shipment in transit, ordering a railcar but releasing it empty, weighing a railcar, tendering one railroad’s car to another railroad without a line-haul move, special train or additional switching services, or releasing a railcar with incomplete or incorrect shipping instructions. Issues relating to accessorial charges may arise in proceedings before the Board in a variety of contexts. See, e.g., Cent. Valley Ag

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This proposed policy statement provides information with respect to certain principles the Board would consider in evaluating the reasonableness of demurrage and accessorial rules and charges. It arises, in part, as a result of the testimony and comments submitted in Oversight Hearing on Demurrage & Accessorial Charges, Docket No. EP 754.⁴ The Board commenced that docket by notice served on April 8, 2019, following concerns expressed by users of the freight rail network (rail users)⁵ and other stakeholders about recent changes to demurrage and accessorial tariffs administered by Class I carriers, which the Board was actively monitoring.⁶

Specifically, in Oversight Hearing on Demurrage & Accessorial Charges (April 2019 Notice), EP 754, slip op. at 2 (STB served Apr. 8, 2019), the Board announced a May 22, 2019 public hearing, which was later extended to include a second

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Grinding, Inc. v. Modesto & Empire Traction Co., NOR 42159 (STB served July 25, 2018) (involving a challenge to accessorial charges).

⁴ Unless otherwise noted, all citations to comments are to material docketed in Oversight Hearing on Demurrage & Accessorial Charges, Docket EP 754.

⁵ As used in this policy statement, the term “rail users” broadly means any person that receives rail cars for loading or unloading, regardless of whether that person has a property interest in the freight being transported. This policy statement uses the terms “warehousemen” or “third-party intermediaries” to refer to these entities with no property interest in the freight.

⁶ In November 2018, the Board sent letters to two Class I carriers, requesting that they examine, from the perspective of reciprocity and commercial fairness, recently announced changes to their policies and practices made in connection with new operating plans they were implementing. After receiving responses from those two carriers, the Board requested each Class I carrier to report its revenues from demurrage and accessorial charges for each quarter of 2018, and, on a going-forward basis, for each quarter of 2019. Because accessorial charges are not uniform among rail carriers, each Class I carrier was asked to identify the specific accessorial items that account for its reported revenues.

day;⁷ directed Class I carriers to appear at the hearing; and invited shippers, receivers, third-party logistics providers, and other interested parties to participate. The notice also directed Class I carriers to provide specific information on their demurrage and accessorial rules and charges and required all hearing participants to submit written testimony, both in advance of the hearing. April 2019 Notice, EP 754, slip op. at 2-4. Comments were also accepted from interested persons who would not be appearing at the hearing.

The Board received over 90 pre-hearing submissions from interested parties; heard testimony over a two-day period from 12 panels composed of, collectively, over 50 participants; and received 36 post-hearing comments.⁸ The Board encourages all carriers, and all shippers and receivers, to work toward collaborative, mutually beneficial solutions to resolve disputes on matters such as those raised in the Oversight Hearing on Demurrage & Accessorial Charges proceeding⁹ and intends for this proposed policy statement to provide useful guidance to all stakeholders.

Through this proposed policy statement, the Board expects to facilitate more effective private negotiations and problem solving between rail carriers and shippers and receivers on issues concerning demurrage and accessorial rules and charges; to help prevent unnecessary future issues and related disputes from arising; and, when they do

⁷ Oversight Hearing on Demurrage & Accessorial Charges, EP 754, slip op. at 1 (STB served May 3, 2019).

⁸ The Appendix to this decision lists the numerous parties that participated in Oversight Hearing on Demurrage & Accessorial Charges, Docket No. EP 754.

⁹ For example, Kansas City Southern Railway Company (KCS) reportedly forgave significant demurrage because the shipper had agreed to spend at least an equal amount to build capacity to store its own cars. KCS Comments 5, May 8, 2019.

arise, to help resolve them more efficiently and cost-effectively. The Board is not, however, making any binding determinations by this proposed policy statement. Nor is the Board promoting complete uniformity across rail carriers' demurrage and accessorial rules and charges; the principles discussed in this proposed policy statement recognize that there may be different ways to implement and administer reasonable rules and charges. When adjudicating specific cases, the Board will consider all facts and arguments presented in such cases.¹⁰

Historical Overview and General Principles

Historically, the detention of freight rail cars was governed by a uniform code of demurrage rules and charges that became effective for national application in 1910. See Chrysler Corp. v. N.Y. Cent. R.R., 234 I.C.C. 755, 759-60 (1939) (recounting history of code's development).¹¹ The uniform code provided for 48 hours of free time for both loading and unloading, which ran from the first 7 a.m. following placement of the cars. It offered shippers and receivers two alternative methods for computing demurrage (straight demurrage and average demurrage), permitted them to choose the method that best suited

¹⁰ Several stakeholders suggested that the Board initiate an investigation into recent tariff changes by Class I carriers. The Board finds that, at this time, rather than conducting an investigation, issuing this proposed policy statement, providing information on broad principles, and soliciting public comment as part of an open process is the more appropriate way to proceed.

¹¹ The code was adopted by the National Convention of Railway Commissioners, and the Interstate Commerce Commission (ICC), the Board's predecessor, soon thereafter recommended that it be "made effective on interstate transportation throughout the country." Swift & Co. v. Hocking Valley Ry., 243 U.S. 281, 283 (1917). One aim of the code was to prescribe rules, to be applied uniformly throughout the country, to help determine what detention was to be deemed reasonable. Pa. R.R. v. Kittanning Iron & Steel Mfg. Co., 253 U.S. 319, 323 (1920).

their needs, and allowed them to switch to the other method on one month's notice.

Straight demurrage applied in the absence of any other arrangement with the rail carrier.¹²

Under the straight demurrage plan, charges were applied and billed on individual cars at daily rates when cars were detained beyond the allowable free time. Saturdays, Sundays, and holidays were excluded unless preceded by at least two chargeable days. Shippers and receivers received no "credits" for returning cars early but were not assessed demurrage if severe weather or other circumstances beyond their control—such as the bunching¹³ of cars due to the act or omission of any rail carrier involved in the movement—prevented them from returning cars on time. Exemption of Demurrage from Regulation, EP 462, slip op. at 1 n.3.

Under the average demurrage plan, shippers and receivers could offset demurrage liability by earning credits for returning cars early but received no relief for bunching. Each car released before the first 24 hours of free time expired earned one credit; a car released during the second 24 hours of free time earned no credit; and cars released after the 48-hour free time period incurred one debit for each excess day. The first four

¹² See generally Exemption of Demurrage from Regulation, EP 462, slip op. at 1-2 n.3 (STB served Mar. 29, 1996); Car Demurrage Rules, Nationwide, 350 I.C.C. 777, 778-79 (1975); Cleveland Elec. Illuminating Co. v. ICC, 685 F.2d 170 (6th Cir. 1982) (describing historical treatment of demurrage and straight and average demurrage plans).

In 1975, the ICC approved a proposal by rail carriers to reduce the free time for loading from 48 hours to 24 hours. See Car Demurrage Rules, Nationwide, 350 I.C.C. 777.

¹³ The uniform code defined bunching as "[w]hen, as the result of the act or neglect of any carrier, cars destined for one consignee, at one point, are bunched at originating point, in transit, or at destination, and delivered by the railroad company in accumulated numbers in excess of daily shipments." Kittanning, 253 U.S. at 323 n.2 (quoting Rule 8 on bunching). More recently, the Board has described bunching as "rail car deliveries that are not reasonably timed or spaced." See Demurrage Liability Final Rule, EP 707, slip op. at 23.

chargeable debit days could be offset by credits earned by early releases. At the end of each month, balances were struck, excess debits were charged at a specified base rate, and excess credits expired. Car Demurrage Rules, Nationwide, 350 I.C.C. at 779.

In 1975, railroads obtained approval from the ICC to, among other things, reduce free time for loading to 24 hours based on evidence that it would not impose an unreasonable burden and would promote better equipment utilization and a more adequate car supply. See generally Car Demurrage Rules, Nationwide, 350 I.C.C. 777. Subsequently, Congress enacted what is now § 10746 in the Rail Revitalization & Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 211, 90 Stat. 31 (the 4-R Act), requiring that demurrage charges be computed in a manner that fulfills specified national needs and that the ICC establish rules and regulations relating to such charges. Congress then enacted the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (the Staggers Act), which made broad deregulatory reforms in the rail industry.

Following enactment of the 4-R Act and the Staggers Act, the ICC in 1985 allowed rail carriers to establish individualized demurrage and storage rules and charges that were based on market forces but still generally subject to the statutory requirements for reasonableness under 49 U.S.C. § 10702 and demurrage under what is now 49 U.S.C. § 10746. Railroads Per Diem, Mileage, Demurrage & Storage Agreement, 1 I.C.C.2d 924, 934 (1985) (finding that “the need for uniform demurrage and storage charges has been overstated” and that “a free market approach to such charges will more effectively foster the goals of the national transportation policy”). Later that year, the ICC sought comment in Exemption of Demurrage from Regulation, Docket No. EP 462, on whether action should be taken under former 49 U.S.C. § 10505 (current 49 U.S.C. § 10502) to

reduce or eliminate the regulation of demurrage. In 1996, the Board ultimately determined not to take further deregulatory action on demurrage, concluding that “exemption could result in shippers paying unreasonable charges for detention that they did not cause. Thus, there is the potential with such an exemption for an abuse of market power.” Exemption of Demurrage from Regulation, EP 462, slip op. at 3.

In December 2010, the Board issued an advance notice of proposed rulemaking (ANPRM) to address “when parties should be responsible for demurrage in light of current commercial practices followed by rail carriers, shippers, and receivers.”

Demurrage Liability (2010 ANPRM), EP 707, slip op. at 1 (STB served Dec. 6, 2010).

Among other things, the 2010 ANPRM noted that there was a need to examine the Board’s policies given a split in the federal courts regarding the liability of

warehousemen and other third-party intermediaries for railroad demurrage. Id. at 2.

Under the final rule, issued in 2014, a person receiving rail cars from a rail carrier for loading or unloading that detains those cars beyond the “free time” provided in a governing tariff may be held liable for demurrage if that person had actual notice, prior to rail car placement, of the demurrage tariff establishing its liability. Demurrage Liability Final Rule, EP 707, slip op. at 1. The rule was based on the theory that responsibility for demurrage should be placed on the party in the best position to expedite the handling of rail cars at origin or destination. Id. at 8.¹⁴

¹⁴ The regulation, codified at 49 C.F.R. part 1333, provides default rules that govern demurrage in the absence of privately negotiated contracts. Demurrage Liability Final Rule, EP 707, slip op. at 25.

With respect to decisions regarding the reasonableness of demurrage rules and charges in individual cases, the Board has “tailor[ed] its analysis to the evidence proffered and arguments asserted under a particular set of facts.” N. Am. Freight Car Ass’n v. BNSF Ry., NOR 42060 (Sub-No. 1), slip op. at 8 (STB served Jan. 26, 2007), aff’d sub nom. N. Am. Freight Car Ass’n v. STB, 529 F.3d 1166 (D.C. Cir. 2008). General principles recognized in past decisions include: that a rail carrier seeking to collect assessed demurrage charges must provide evidence to establish the dates of actual or constructive car placement and release and to show how the assessed charges were computed;¹⁵ that a rail carrier may not collect demurrage when it is responsible for the delay;¹⁶ and that the shipper or receiver must establish by competent evidence that the assailed charges are unlawful based on the claims it has asserted.¹⁷

The Board has also recognized that demurrage principles may continue to develop as industry practices and technology change. In Capitol Materials, for example, the Board stated that “[i]n light of the technological advances that have been made with respect to railroad operations in recent years, it might be appropriate for railroads to reconsider some of their longstanding demurrage practices under which delivering railroads charge their customers demurrage regardless of the reasons for delays.” 7

S.T.B. at 577-78 (noting that the widespread use of computers and sophisticated tracking

¹⁵ See, e.g., R.R. Salvage & Restoration, Inc.—Pet. for Declaratory Order—Reasonableness of Demurrage Charges, NOR 42102 et al., slip op. at 6 (STB served July 20, 2010).

¹⁶ See, e.g., Capitol Materials, Inc.—Pet. for Declaratory Order—Certain Rates & Practices of Norfolk S. Ry., 7 S.T.B. 576, 577 (2004).

¹⁷ See, e.g., Savannah Port Terminal R.R.—Pet. for Declaratory Order—Certain Rates & Practices as Applied to Capital Cargo, Inc., FD 34920, slip op. at 8 n.20 (STB served May 30, 2008).

systems now allows railroads to determine the location of rail cars in the rail system with more precision, and that in-transit delays and other anomalies that could interfere with time-of-delivery expectations also would likely be known). Most recently, in Utah Central Railway—Petition for Declaratory Order—Kenco Logistic Services, LLC, FD 36131, slip op. at 12 n.38 (STB served Mar. 20, 2019), the Board noted that it may need to consider future action to ensure that shippers, receivers, and smaller rail carriers are not being forced to bear the burden of delays due to actions not attributable to them.

The overarching purpose of demurrage is to incentivize the efficient use of rail assets (both equipment and track) by holding rail users accountable when their actions or operations use those resources beyond a specified period of time. *See, e.g., Kittanning*, 253 U.S. at 323 (“The purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars.”).¹⁸ Under this foundational precept, that period of time must be reasonable,¹⁹ and further it is unreasonable to charge demurrage for delays attributable to the rail carrier. *See, e.g., R.R. Salvage & Restoration, Inc.*, NOR 42102 et al., slip op. at 4 (stating “a shipper is not required to compensate a railroad for delay in returning the asset if the railroad and not the shipper is responsible for the delay”). The

¹⁸ Accord Increased Demurrage Charges, 1956, 300 I.C.C. 577, 585 (1957) (“The primary purpose of demurrage regulations is to promote equipment efficiency by penalizing the undue detention of cars.” (citation omitted)). As acknowledged by one rail carrier in the Docket No. EP 754 proceeding, demurrage charges should not serve as a “revenue play” or “a source of profit.” Union Pacific Railroad Company (UP) Comments 19, June 6, 2019 (filing ID 247892) (further stating that “Union Pacific would rather not bill for accessorial and demurrage charges.”). As noted by another rail carrier, “Congress framed the purposes of demurrage not in terms of cost recovery or a penalty for poor performance, but rather in terms of incentives.” Canadian National Railway Company (CN) Comments 8, June 6, 2019.

¹⁹ *See, e.g., Kittanning*, 253 U.S. at 323 (stating a shipper is “entitled to detain the car a reasonable time”); R.R. Salvage & Restoration, Inc., NOR 42102 et al., slip op. at 4 (stating that time period must be reasonable).

Board has also expressed concerns about demurrage charges for delays that a shipper or receiver did not cause. See, e.g., Utah Central Ry., FD 36131, slip op. at 12 n.38; Exemption of Demurrage from Regulation, EP 462, slip op. at 4. Where demurrage charges are imposed for circumstances beyond the shipper's or receiver's reasonable control, they do not accomplish their purpose to incentivize behavior to encourage efficiency—the stated rationale for and objective of the rail carriers' demurrage rules and charges²⁰—and the purpose of demurrage is not fulfilled. Charges assessed for circumstances beyond the shipper's or receiver's reasonable control would, as a general matter, not fulfill the purpose of demurrage.

The general principles discussed below, which flow from the agency's precedent and governing statutes and are consistent with the purpose of demurrage, can help frame the demurrage reasonableness issues in individual cases, together with the evidence and argument presented in those proceedings.

Free Time

Background. Free time—a major focal point of the May 2019 oversight hearing—is the period of time allowed for a shipper or receiver to finish using rail assets and return them to the railroad before demurrage charges are assessed.²¹ Free time is a critical component of demurrage charges, the purpose of which, as noted above, is “to

²⁰ See, e.g., citations *infra* note 24.

²¹ Tariff provisions typically define the amount of free time provided in terms of 24-hour periods or “credit days,” which commonly begin to run at 12:01 a.m. the day following actual or constructive placement. Constructive placement occurs when a rail car is available for delivery but cannot actually be placed at the receiver's destination because of a condition attributable to the receiver (for example, lack of room on the tracks in the receiver's facility). The railroad holds the car and sends notice to the receiver. See Savannah Port Terminal R.R., FD 34920, slip op. at 3 n.6 (citing Capitol Materials, 7 S.T.B. 576).

promote car efficiency by penalizing undue detention of cars.” Kittanning, 253 U.S. at 323 (further noting that “the duty of loading and of unloading carload shipments rests upon the shipper or consignee. To this end he is entitled to detain the car a reasonable time without any payment in addition to the published freight rate.”). As the Board has explained:

A railroad has a right to set a reasonable time—free time—for a shipper to finish using rail assets and return them to the railroad. If a shipper keeps an asset for too long (beyond the allocated free time), it should compensate the railroad for the extended use of its asset (rail cars or track)—in other words, for demurrage. However, a shipper is not required to compensate a railroad for delay in returning the asset if the railroad and not the shipper is responsible for the delay.

R.R. Salvage & Restoration, Inc., NOR 42102 et al., slip op. at 4. Free time also helps temper adverse impacts to shippers and receivers of delays arising from service variability.²²

In addition, free time plays a role in the credit and debit rules and practices of many rail carriers. Free time is often expressed in terms of credit days that are allotted and applied to incoming cars before demurrage charges begin to accrue. Separate from free time, some rail carriers also provide credits for certain problems and delays. Many

²² See N. Am. Freight Car Ass’n, NOR 42060 (Sub-No. 1), slip op. at 13 (noting, among other things, that private agricultural hopper car owners were given an average of two days to accept empty private cars without charge, in response to claim that objectionable storage charges were attributable to service variability).

rail carriers administer rules and practices under which demurrage charges (debits) can be offset by credits that have been allocated to the shipper or receiver.²³

As described above in the “Historical Overview,” the uniform code that historically governed demurrage allowed 48 hours of free time for loading and unloading until 1975, when the ICC approved a reduction of free time for loading to 24 hours. In 1985, the ICC allowed rail carriers to establish individualized demurrage and storage rules and charges. However, until recently, it remained common practice for a rail carrier to provide at least 24 hours of free time (or one credit day) to load rail cars and at least 48 hours of free time (or two credit days) to unload cars. See generally Portland & W. R.R.—Pet. for Declaratory Order—RK Storage & Warehousing, Inc., FD 35406, slip op. at 5 (STB served July 27, 2011) (citing references to tariff provisions providing 48 hours for unloading in demurrage decisions handed down in 2010, 2004, and 2000). Some Class I carriers use alternative rules and practices for private cars in which no credit days are given as a proxy for free time. These alternative rules and practices are also discussed below.

Current Issues. Last fall, the Board became aware that several Class I carriers had implemented or announced significant tariff changes that made or would make, among other things, substantial reductions to the free time allowed to shippers and receivers. At least one rail carrier reduced the number of credit days for loading and unloading private cars, in some circumstances, from two to zero. Some other rail carriers

²³ See Capitol Materials, 7 S.T.B. at 578 (describing demurrage programs under which credits for cars released before the end of the allowable free time can be used to offset demurrage charges for other cars that are released after the allowable free time has expired).

reduced free time for unloading from 48 to 24 hours (or two credit days to one) for both private and railroad-owned cars. After various letter requests to Class I carriers, see supra note 6, the Board instituted the proceeding in Oversight Hearing on Demurrage & Accessorial Charges, Docket No. EP 754. In its April 2019 Notice, the Board directed the Class I carriers to submit information on a list of specified subjects, including all tariff changes since January 2016 pertaining to the amount of free time allowed for loading and unloading rail cars and the reason(s) for the change. April 2019 Notice, EP 754, slip op. at 2-3.

The rail carriers consistently identified the same objectives and rationales for reductions to free time: to align the behavior of shippers and receivers in order to promote network fluidity to benefit all rail users with improved service reliability and reduced cycle times. Carriers stated that the reductions were made to enable them to optimize network efficiencies and provide better, more reliable service; that the changes were not made to generate revenue; and that their hope is that recent revenue increases generated from demurrage charges will be temporary as shippers and receivers adapt and respond because, in the words of one rail carrier, “the intention is to improve service, not drive cost increases for our customers.”²⁴ Rail carriers’ post-hearing submissions largely reiterated these points and expressed willingness to work with shippers and receivers to help them align their behavior to better meet the reductions in free time. While the Board

²⁴ UP Comments 2, May 8, 2019; see generally id. at 1-2; UP Comments 3, June 6, 2019 (filing ID 247876); Norfolk Southern Railway Company (NSR) Comments 2-3, May 8, 2019; CSX Transportation, Inc. (CSXT) Comments 3-5, May 8, 2019. BNSF Railway Company (BNSF) stated that it “puts a tremendous amount of energy and resources into the area of demurrage and storage for the express purpose of collecting less demurrage revenue.” BNSF Comments 5, May 8, 2019.

recognizes some rail carriers made certain changes and conducted additional outreach following the hearing, many of the broader issues raised before, during, and after the hearing remain.

In comments submitted both prior to and following the hearing, and in testimony at the hearing, interested parties from many industries expressed multiple concerns about the recent reductions in free time. Several stated that they lacked the physical capacity or capital needed to expand their facilities to meet the reduced time periods.²⁵ Others stated that past investments, as well as infrastructure and operational decisions, had been made based on the standard free time periods previously in place over many years.²⁶ Many stated that they, or their members, regularly experience bunching or otherwise unreliable service (including missed switches or unpredictable switching times); that bunching is a major obstacle to compliance with the reduced free time periods; and that the recent reductions have made it even more difficult and costly to deal with unreliable service because the free time that has been eliminated had served as an important buffer against irregular and unpredictable railroad performance.²⁷ To cope with free time reductions, to

²⁵ See, e.g., Corn Refiners Association (CRA) Comments 5, May 8, 2019; Agricultural Retailers Association (ARA) Comments 5, May 8, 2019; Consolidated Scrap Resources Inc. (CSR) Comments 4-5, May 8, 2019; Lyondell Chemical Company, Equistar Chemicals LP & Lyondell Basell Acetyls, LLC (LYB) Comments 2, May 8, 2019.

²⁶ See, e.g., The Fertilizer Institute (TFI) Comments 2, May 8, 2019; Barilla America, Inc. (Barilla) Comments 4, 10, May 8, 2019; MillerCoors LLC (MillerCoors) Comments 16-17, May 8, 2019.

²⁷ See, e.g., Barilla Comments 9, 11, May 8, 2019; National Industrial Transportation League (NITL) Comments 4-5, May 8, 2019; National Grain and Feed Association (NGFA) Comments 10-11, 22, May 8, 2019; TFI Comments 2-4, May 8, 2019; American Forest & Paper Association Comments 3-5, May 8, 2019; Institute of Scrap Recycling Industries, Inc. (ISRI) Comments 2, 4-5, 8-9, May 8, 2019; International Paper (IP) Comments 2-4, May 7, 2019; Anderson-Dubose Company (Anderson-Dubose)

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the extent they could, they reported having to build more track at their facilities, lease track at remote locations, add worker shifts, or resort to other transportation modes (typically trucking).²⁸

Shippers that rely on private rail cars expressed additional concerns. Many noted a significant industry shift since the enactment of 49 U.S.C. § 10746 from rail carrier ownership of rail cars to private car ownership and described how they had previously been encouraged by rail carriers to use private cars or had been forced to do so because the supply of railroad-owned cars was insufficient.²⁹ In addition to the types of challenges and experiences described above, private car users objected to recent tariff changes that eliminated credit days previously allotted as free time for private (but not railroad-owned) cars as unreasonable and commercially unfair.³⁰

Discussion. Demurrage serves a valuable purpose to encourage the efficient use of rail assets (both equipment and track) by holding shippers and receivers accountable

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Comments 2-3, May 8, 2019; LYB Comments 2, May 8, 2019; American Chemistry Counsel (ACC) Comments 4, May 8, 2019.

²⁸ See, e.g., TFI Comments 4-5, May 8, 2019; ISRI Comments 8-9, May 8, 2019; ARA Comments 5, May 8, 2019; Brainerd Chemical Co. (Brainerd) Comments 7, May 8, 2019; Lhoist North America (Lhoist) Comments 2, May 7, 2019.

²⁹ See, e.g., NGFA Comments 6, May 8, 2019; CSR Comments 2-3, 6, May 8, 2019; Ag Processing Inc Comments 1-2, 5, May 8, 2019; MillerCoors Comments 7, May 8, 2019; Lhoist Comments 2, May 7, 2019; ISRI Comments 2, June 6, 2019.

³⁰ See, e.g., Diversified CPC International, Inc. Comments 5-7, 11, May 8, 2019; Auriga Polymers, Inc./Indorama Comments 2-3, May 8, 2019; ACC Comments 2, 9, May 8, 2019; NGFA Comments 17-18, May 8, 2019; CRA Comments 3-4, May 8, 2019; ISRI Comments 2, June 6, 2019. Among other concerns, these commenters explained that allowing no free time for private cars beyond midnight on the date of constructive placement could result in situations where a shipper could not possibly avoid demurrage charges, because it might have only minutes to evaluate its ability to accept and order the incoming car.

when their actions or operations use those assets beyond a specified period of time. That period of time must be reasonable and consistent with the purpose of demurrage.

However, the Board has heard repeatedly, from interested parties in a broad range of industries, that it has become difficult, if not impossible, to avoid demurrage charges following the recent reductions in free time, particularly in light of inconsistencies in rail service.³¹ Commenters across a range of industries questioned rail carriers' claims that the changes are reasonable under § 10702 and can be justified as meeting national needs under the standard Congress prescribed in § 10746. Many commenters noted that they had seen no improvement in the reliability or consistency of rail car deliveries upon which their own operations depend, while others stated that bunched deliveries had increased.³² Rail carriers presented data, generally on a system-wide basis, reflecting recent improvements in some metrics, such as transit time, dwell time, system velocity, and trip plan compliance. However, rail carriers presented limited data on the extent to which changes to their demurrage rules and charges caused reductions in loading and unloading times, as compared to the times prior to the changes.

³¹ See, e.g., CRA Comments 4, May 8, 2019 (explaining why, “[f]or all CRA members, whether they have open or closed-gate facilities, their ability to actually accept a rail car with zero free-time is highly dependent upon their consistency of rail service”); NITL Comments 4-5, May 8, 2019 (noting that “[i]t is not uncommon for carriers to have variation in their deliveries of more than twenty-four hours” and that reducing free time will only exacerbate the costs and challenges shippers and receivers already bear from delays attributable to the railroads’ actions); TFI Comments 5, May 8, 2019 (“inconsistent rail service remains their greatest obstacle to compliance”).

³² See, e.g., CSR Comments 6, May 8, 2019; Anderson-DuBose Comments 2-3, May 8, 2019; IP Comments 3-4, May 7, 2019; ACC Comments 1-3, June 6, 2019.

The Board is troubled by the adverse impacts of reductions in free time to rail users and the potentially negative consequences of providing no credit days for private cars if rail carriers do not have reasonable rules and practices for dealing with, among other things, variability in service and carrier-caused bunching, and for ensuring that shippers and receivers have a reasonable opportunity to evaluate and order incoming cars before demurrage begins to accrue. As noted above, many commenters described the already difficult challenges and adverse impacts caused by bunched deliveries, missed or unpredictable switching times, and other variations in rail service (some of which occur even when rail service is working well). Commenters also explained that, when free time is reduced by 24 hours or more (whether, for example, from two credit days to one credit day for unloading, or to zero credit days for private cars), an important buffer against service inconsistencies and variations in car deliveries is undermined. In addition, commenters explained that eliminating credit days so as to allow no free time for private cars beyond midnight of the constructive placement date could result in demurrage being unavoidable because the receiver would have no reasonable opportunity to evaluate its ability to accept and order the incoming car.

Based on the information presented in the Docket No. EP 754 oversight proceeding, the Board has serious concerns about the reasonableness of reductions in free time that make it more difficult for shippers and receivers to contend with variations in rail service and do not serve to incentivize their behavior to encourage the efficient use of rail assets.³³ The Board is also concerned that, in some circumstances, such reductions

³³ Parties are, of course, free to negotiate and enter into contracts that provide for any period of free time (including zero) to which the parties agree. 49 C.F.R. § 1333.2;
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may be inconsistent with rail carriers' statutory charge to compute demurrage and establish related rules in a way that fulfills the national needs specified in § 10746 and may be incompatible with the overarching purpose of demurrage—namely, to encourage the efficient use of equipment by penalizing the undue detention of cars.³⁴ Where, for example, carrier-caused circumstances give rise to a situation in which it is beyond the shipper's or receiver's reasonable control to avoid charges, demurrage does not fulfill its purpose.

Such circumstances might include, for example, charging demurrage that accrues as a result of a missed switch (both cars scheduled to be switched and incoming cars impacted by the missed switch); charging demurrage for transit days to move cars from constructive placement in remote locations; or charging demurrage that arises from bunched deliveries substantially in excess of the number of cars ordered until the shipper or receiver has had a reasonable opportunity to process the excess volume of incoming cars. Changes in historical practices on which the shipper or receiver has long relied (e.g., regarding switching frequency or delivery methods that deviate from prior arrangements made by the parties) may also be taken into account.³⁵

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Demurrage Liability Final Rule, EP 707, slip op. at 25 (noting that the Board's rules specifically allow parties to enter into contracts pertaining to demurrage). In addition, the Board notes that demurrage programs that do not provide any credit days for private cars could be reasonable if, among other things, they give shippers and receivers a reasonable window of time to accept incoming cars without incurring demurrage charges.

³⁴ See supra note 18; 49 C.F.R. § 1333.1 (demurrage “serves as a penalty for undue car detention to encourage the efficient use of rail cars in the rail network”).

³⁵ On the other hand, circumstances within the shipper's or receiver's reasonable control might include, for example, taking reasonable steps to: ensure that its facility is right-sized for its expected volume of incoming traffic when it receives reliable, consistent service; manage its pipeline to mitigate expected incoming car volumes that
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Lastly, the Board is concerned that, in some circumstances, such reductions in free time may jeopardize important goals of the nation's rail transportation policy by rendering freight rail service less likely to meet the needs of the public and, if other modes are even effectively an option for a rail user, less competitive with other transportation modes.³⁶

The Board recognizes that reductions in free time might be justified if there were evidence to show, by way of example, that (1) advances in technology or productivity, or other changes across the industry, have made compliance with the shorter time frames reasonable to achieve; (2) service improvements resulting from more efficient use of rail assets would facilitate the ability of shippers and receivers to adjust to the reductions; (3) reductions are necessary to address systemic problems with inefficient behavior or practices by shippers or receivers; or (4) rail carriers have implemented tariff provisions or program features, such as credits for bunching, service variabilities, and certain capacity constraints, that place the avoidance of demurrage charges within the reasonable control of a shipper or receiver.

The Board also recognizes that demurrage serves an important purpose, namely, incentivizing the behavior of rail users to encourage the efficient use of rail assets, which benefits rail carriers and users alike. Rail carriers and users have a shared responsibility

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exceed its capacity; and order and release cars in the manner specified by reasonable tariff requirements.

³⁶ See 49 U.S.C. § 10101 (stating, in pertinent part, “[i]n regulating the railroad industry, it is the policy of the United States Government . . . (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense; . . . [and] (14) to encourage and promote energy conservation”).

in this endeavor—rail carriers to implement and administer reasonable rules and charges designed to accomplish this goal, and rail users to recognize and accept responsibility for promoting efficiencies within their reasonable control.

Bunching

The April 2019 Notice invited stakeholders to comment on recent experience with demurrage and accessorial charges pertaining to bunching, including bunching that may be attributable to upstream rail carriers. April 2019 Notice, EP 754, slip op. at 3.

Bunching-related issues were identified as a common problem by rail users across a broad range of industries. Many commenters stated that they regularly experience bunched deliveries of rail cars and are charged demurrage for related backlogs; several reported that unpredictable, bunched deliveries increased in frequency following changes to rail carriers' operating plans.³⁷ In other words, these commenters contend that recent operating changes and actions by rail carriers may be resulting in rail car deliveries that are not "reasonably timed or spaced," which the shipper or receiver cannot prevent.³⁸

³⁷ See generally, e.g., citations supra notes 27 & 32, infra note 38; ISRI Comments 2, May 8, 2019; International Association of Refrigerated Warehouses (IARW) Comments 1-2, May 8, 2019.

³⁸ See, e.g., Private Railcar Food and Beverage Association, Inc. (PRFBA) Comments 3-4, May 8, 2019 ("The net impact of this new service model is that railcars get bunched in route while waiting for the next full train to depart. PRFBA has been told by several railroads that the term for this occurrence is no longer called 'bunching'; this negative delivery practice is now referred to as 'train building' in the [Precision Scheduled Railroading (PSR)] world."). As explained by another industry organization, despite its members' best efforts to regulate the tender of rail cars to arrive over a defined time period, cars may be delayed or held for the railroad's convenience, resulting in a single mass of cars delivered at once. ACC Comments 3-4, May 8, 2019 (also describing other types of carrier-caused bunching and limits to the effectiveness of related credits offered by rail carriers, including that credits are not available for bunching caused by upstream rail carriers); IARW Comments 1-2, May 8, 2019 (bunching is a major

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Commenters also reported that some rail carriers have eliminated tariff provisions that formerly provided demurrage relief for bunching; that rail carriers that do provide relief for bunching often do not do so automatically, instead billing for the charge and requiring the shipper or receiver to apply for a credit or dispute the charge; and that relief for upstream bunching is not available.³⁹ Some rail carriers stated that they award credits for bunching in some instances, but did not describe with specificity how adjustments are made or otherwise address the concerns expressed by rail users.⁴⁰

Demurrage disputes pertaining to bunching are best addressed in the context of case-specific facts. See Demurrage Liability Final Rule, EP 707, slip op. at 23-24. As discussed above, demurrage charges must be designed to incentivize shippers' and receivers' behavior. Where rail carriers' operating decisions or actions result in bunched deliveries and demurrage charges that are not within the reasonable control of the shipper or receiver to avoid, the purpose of demurrage is not fulfilled.⁴¹ When analyzing the

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contributor to demurrage despite efforts by shippers to appropriately space shipments to warehouses).

³⁹ See, e.g., NGFA Comments 22-23, 26, May 8, 2019; NITL Comments 5, May 8, 2019; ACC Comments 3-4, May 8, 2019.

⁴⁰ In post-hearing comments, CSXT stated that if a customer raises a dispute and "that customer's demurrage was caused by CSXT bunching traffic, CSXT will provide credits for those days of demurrage." CSXT Comments 11-12, June 6, 2019. UP stated that it applied a "case-by-case process within which customers are credited for carrier-caused bunching," and that UP "takes into account customer choices and actions, the actions of [UP's] interline partners, and [UP's] own actions in determining whether a customer should be charged for bunching-related demurrage." UP Comments 10, June 6, 2019 (filing ID 247892). It is unclear whether UP engages in this process automatically or only if a dispute is raised, and UP does not describe what actions it does and does not consider.

⁴¹ As noted above, such circumstances might include, for example, charging demurrage that arises from bunched deliveries substantially in excess of the number of

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appropriateness of demurrage charges, rail carriers should consider these principles both when cars originate with the serving carrier and when cars originate on an upstream carrier. Rail carriers are encouraged to take these considerations into account in their future administration of demurrage rules and charges, particularly in evaluating whether their automatic billing processes sufficiently account for carrier-caused bunching (for cars that originate on their network or upstream, and bunching attributable to missed switches), and in resolving any related disputes. In any future proceeding, the Board expects to take these considerations into account as well, along with any additional evidence and argument the parties may choose to present.

Overlapping Charges

Many participants in the Docket No. EP 754 oversight proceeding voiced concerns about additional charges recently instituted by two Class I carriers for claimed customer-caused congestion or delay. The first, a so-called “congestion” charge, was reportedly being assessed by NSR following a determination, in its sole judgment, that an excessive quantity of cars for a given consignee causes material operating problems at an NSR facility.⁴² Commenters objected that the \$100 per car/per day charge, assessed on five days’ notice for all cars destined for the location identified as congested, was arbitrary and unreasonable in its own right, and that it effectively resulted in a double recovery for NSR because it served the same purpose (incentivizing the prompt removal

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cars ordered until the shipper or receiver has had a reasonable opportunity to process the excess volume of incoming cars.

⁴² See ACC Comments 5, May 8, 2019; NGFA Comments 19, May 8, 2019; NITL Comments 6-7, May 8, 2019 (referencing NSR Tariff 8002-A, Item 6265).

of cars held in railroad yards) as demurrage charges, to which the cars in question were also subject.

Another type of potentially overlapping charge, termed “not prepared for service,” was implemented by UP. As initially established, UP reportedly assessed the \$400 per car/per occurrence charge when it determined, in its discretion, that it was unable to pull or spot a car due to a customer’s actions.⁴³ The applicable tariff item lists various examples of situations—including cars that cannot be spotted due to track being blocked by other cars—that would permit UP to assess the additional charge. Commenters objected to this charge on multiple grounds, including that it could be imposed even when UP could service some (but not all) cars that had been released, and that the charge was often imposed in situations beyond the customer’s control.⁴⁴ Commenters stated that UP does not commit to a service window to pull released cars; that days may pass before UP arrives to pull released cars; and that shippers are given little or no advance notice of UP’s arrival and have insufficient time to move cars that in the interim may be blocking released cars in order to avoid the charge.⁴⁵

Both rail carriers have since responded to these concerns. Specifically, UP announced during the May 2019 hearing that it has abated the “not prepared for service” charge by applying it “per occurrence” (rather than “per car”), establishing a threshold trigger of three occurrences per month, and clarifying that where the charge is applied,

⁴³ See NGFA Comments 12-14 (referencing UP Accessorial Tariff 6004, Item 9005).

⁴⁴ See ISRI Comments 6-7, May 8, 2019; Barilla Comments 8-9, May 8, 2019.

⁴⁵ See NGFA Comments 12-14, May 8, 2019.

demurrage would not be assessed. NSR advised the Board that it would no longer assess a “congestion” charge as of July 1, 2019.

The Board is encouraged by these actions but nevertheless notes that, when adjudicating specific cases, it would have significant concerns about the reasonableness of any tariff provision that sought to impose a charge, in addition to the otherwise applicable demurrage charge, for congestion or delay that is not within the reasonable control of the shipper or receiver to avoid. Although the Board remains open to evidence and argument that such a charge could in some instance be reasonable, no such information was presented in Docket No. EP 754.

Invoicing and Dispute Resolution

The April 2019 Notice invited stakeholders to comment on whether the tools available to manage demurrage and accessorial charges provide adequate data for shippers and receivers to evaluate whether charges are being properly assessed and to dispute the charges when necessary. April 2019 Notice, EP 754, slip op. at 3. It also directed Class I carriers to provide information on the procedures and time periods applicable to the process for raising and resolving disputed charges. Id. The comments and information received revealed several issues of concern.

Shippers and receivers stated repeatedly that under the programs administered by several rail carriers, demurrage and accessorial charges are difficult, time-consuming, and costly to dispute; that invoices are often inaccurate or lack information needed to assess the validity of the charges; and that erroneous invoices are issued even when the tariff expressly provides for relief or the rail carrier has acknowledged its responsibility for the problem, compelling the shipper or receiver to initiate a protracted dispute resolution

process.⁴⁶ Commenters also stated that, pursuant to some rail carriers’ rules and practices, charges must be disputed within limited time frames, while those carriers are often slow to respond, and disputes are often denied.⁴⁷ Some tariffs also have imposed costs or charges that serve as a deterrent to pursuing a dispute or a formal claim.⁴⁸

The Board is deeply troubled by these reports, which came from shippers and receivers in a broad range of industries that are highly dependent on rail service. If rail carrier practices effectively preclude a rail user from determining what happened, then the user would not be able to determine whether it was responsible for the delay; the responsible party would not be incentivized to modify its behavior; and the demurrage charges would not achieve their purpose. Transparency and mutual accountability are important factors in the establishment and administration of reasonable demurrage and accessorial rules and charges. Rail shippers and receivers should be able to review and, if necessary, dispute charges without the need to engage a forensic accountant or expend “countless hours and extra overhead” to research charges and seek to resolve disputes.⁴⁹

The Board encourages all Class I carriers (and Class II and Class III carriers to the extent they are capable of doing so), taking into account the principles discussed here, to provide, at a minimum and on a car-specific basis: the unique identifying information of

⁴⁶ See, e.g., National Coal Transportation Association Comments 8-9, May 8, 2019; NITL Comments 8, May 8, 2019; Packaging Corporation of America (PCA) Comments 4-5, 7-8, May 8, 2019; Brainerd Comments 4, May 8, 2019; IP Comments 4, May 7, 2019.

⁴⁷ See, e.g., NGFA Comments 26-28, May 8, 2019; ACC Comments 4, May 8, 2019; CSR Comments 4, May 8, 2019.

⁴⁸ See, e.g., NGFA Comments 27-28, May 8, 2019 (citing provisions in UP, NSR and KCS tariffs); ACC Comments 4, May 8, 2019 (citing provision in NSR tariff).

⁴⁹ IP Comments 4, May 7, 2019; accord PCA Comments 4-5, 7-8, May 8, 2019 (describing process that is “hugely time and resource consuming”).

each car; the waybill date; the status of each car as loaded or empty; the commodity being shipped; the identity of the shipper, consignee, and/or care-of party; the origin station and state of the shipment; the dates and times of actual placement, constructive placement (if applicable), notification of constructive placement (if applicable), and release; and the number of credits and debits issued for the shipment (if applicable).⁵⁰ The Board also expects rail carriers to bill for demurrage only when the charges are accurate and warranted, consistent with the purpose of demurrage. With respect to the dispute resolution process more broadly, rail shippers and receivers should be given a reasonable time period to request further information and to dispute charges, and the rail carrier likewise should respond within a reasonable time period. Finally, the Board has serious concerns about the reasonableness of costs or charges that could deter shippers and receivers from pursuing a disputed claim.⁵¹ Although the Board remains open to argument and evidence, based on the record in Docket No. EP 754, there is no apparent justification for imposing such costs or charges.

The Board recognizes that some rail carriers may already employ billing practices consistent with the practices described above, and with the principles discussed in this proposed policy statement. The Board intends through this decision to provide information about how it would consider the reasonableness of invoicing and dispute resolution procedures when adjudicating specific cases, along with the consideration of

⁵⁰ In Demurrage Billing Requirements, Docket No. EP 759, served concurrently with this decision, the Board is proposing to specify certain information that Class I carriers must provide on or with demurrage invoices to enable recipients of those invoices to, among other things, readily verify the validity of the demurrage charges.

⁵¹ The Board notes that NSR has announced that, effective July 1, 2019, disputes for demurrage and storage charges or computations can be submitted without any potential charge.

any additional evidence and argument the parties may choose to present. The Board also commends rail carrier commitments to addressing demurrage disputes through arbitration or other streamlined dispute resolution procedures and encourages additional commitments to do so.⁵² The Board hopes that such commitments, together with the principles addressed here and the outcome of the proposed rule relating to invoice requirements, will make it unnecessary for the Board to revisit these issues.

Credits

The April 2019 Notice directed Class I carriers to provide information on their systems and practices for issuing credits and debits in connection with the assessment of demurrage or accessorial charges and to describe any limits on the amount of credits or debits that may be available or incurred. April 2019 Notice, EP 754, slip op. at 3.⁵³ It also invited all stakeholders to share their perspectives on whether demurrage and accessorial tariffs in effect during the past three years have created balanced and appropriate incentives for both customers and railroads. Id. at 4.

With respect to credits, a common concern voiced by shippers and receivers is that limitations imposed by rail carriers' credit and debit rules and practices diminish the

⁵² The Board notes that three of the Class I carriers have agreed to arbitrate certain demurrage disputes under the binding, voluntary program set forth in 49 C.F.R. part 1108. See UP Notice (June 21, 2013), CSXT Notice (June 28, 2019), and CN Notice (July 1, 2019), Assessment of Mediation & Arbitration Procedures, EP 699. In addition, BNSF was commended by one commenter in the Docket No. EP 754 proceeding for including an arbitration provision in its tariffs. See NGFA Comments 28, May 8, 2019.

⁵³ Each rail carrier sets its own rules and practices for issuing credits and debits in connection with the assessment of demurrage or accessorial charges; however, a common aspect across rail carriers' rules and practices is that certain types of credits expire monthly.

utility of credits as a means of offsetting debits that are incurred.⁵⁴ At the same time, as noted by one commenter, “railroad-imposed demurrage and accessorial charges do not ‘expire’ until paid.” NGFA Comments 9, June 6, 2019.

The Board is troubled by this lack of reciprocity, particularly where the expiration date of a credit, in effect, undermines the value of a credit or credits that were allocated for a problem or delay that was not within the reasonable control of a shipper or receiver. The Board also recognizes that credits issued for carrier-caused problems and delays serve a different purpose than credits that function as a proxy for free time, and that different types of credits might have different expiration time frames. The Board remains open to argument and evidence in future cases that involve these issues. However, as preliminary guidance based on the information presented in Docket No. EP 754, the Board would evaluate how credit rules and practices are administered in determining the reasonableness of demurrage rules and charges when adjudicating specific cases, including, in particular, whether the shipper or receiver has been afforded a reasonable opportunity to make use of the credits in question, before any expiration date imposed by the rail carrier. The Board would also take into account the credits’ purpose and function. The Board also notes that these concerns would be allayed if shippers and receivers were compensated for the value of unused credits at the end of each month, rather than the credits merely expiring.

⁵⁴ See, e.g., TFI Comments 4, May 8, 2019 (credits issued for carrier-caused bunching near the end of the month have an expiration date of just a few days); Western Coal Traffic League Comments 3, June 6, 2019 (ensuring that credits do not expire after only a few weeks would increase reciprocity in rail carrier practices); American Fuel & Petrochemical Manufacturers Comments 12, 16, May 8, 2019 (credit systems are not balanced).

Notice of Major Tariff Changes

The April 2019 Notice requested information on the notice given in connection with recent changes in Class I carrier demurrage and accessorial tariffs, and feedback concerning impacts on shippers, receivers, third-party logistics providers, and short line railroads flowing from those changes. April 2019 Notice, EP 754, slip op. at 3-4. Insufficient notice, particularly with respect to changes involving reductions in free time, was identified as a widespread problem in the feedback the Board received.

In the words of one commenter, “the operational challenges and costs caused by reductions in free time were aggravated by the lack of sufficient notice and coordination that would have allowed rail customers to plan for the change.”⁵⁵ Another commenter explained that its members had designed their operations and infrastructure around the 48-hour standard, and “suddenly have been forced to redesign everything” with less than 45 days’ notice in many cases.⁵⁶ A third commenter noted that rail carriers had many months to adjust their operations to implement PSR but often expected their customers to comply with associated new rules and practices in 45 days.⁵⁷

⁵⁵ NITL Comments 4, May 8, 2019 (further stating that, “[g]iven the complexity of rail operations and the time, money[,] and difficulty involved in constructing new facilities or otherwise acquiring additional track capacity to address the reduction in free time, 45 days of notice was insufficient for many shippers and receivers”).

⁵⁶ TFI Comments 2, May 8, 2019 (further stating that the ability of TFI members to comply with the new free time rules varies by member and location, but that compliance “takes time and comes at a substantial cost”).

⁵⁷ ACC Comments 7-8, May 8, 2019 (further stating that “[a]ctions such as building or acquiring new infrastructure to avoid storage charges require far more time. It is unreasonable to impose charges while a facility is acting in good faith to implement necessary changes”).

As a matter of commercial fairness, and consistent with the principles discussed in this proposed policy statement, railroads should provide sufficient notice of major changes to demurrage and accessorial tariffs to enable shippers and receivers to evaluate, plan, and undertake any feasible, reasonable actions to avoid or mitigate new resulting charges. The Board recognizes that a 20-day notice period is statutorily prescribed for changes to common carrier rates and service terms. 49 U.S.C. § 11101(c). However, rail carriers themselves recognized that 20 days was not sufficient for many of the changes recently implemented, and generally provided between 45 and 60 days, while other commenters stated that the marginally longer notice periods that were provided were still insufficient.

Rail carriers also described various other actions taken to help shippers and receivers adapt, such as delayed billing and working with those that needed more flexibility.⁵⁸ The Board encourages rail carriers to take these and other initiatives to support all rail users facing the financial, operational, or other challenges of adjusting to major tariff changes, to thoughtfully consider the amount of advance notice that should be given, and to be especially cognizant of and accommodating to any unique obstacles a shipper or receiver may face in adapting to demurrage and accessorial tariff changes.

⁵⁸ See also N. Am. Freight Car Ass'n, NOR 42060 (Sub-No. 1), slip op. at 9 (referencing steps taken by BNSF to inform shippers about the newly imposed storage charges and respond to shippers' concerns, including offering to waive the charges in the first year to offset the cost of new track construction and offering to enter into transitional leases).

Demurrage Billing to Shippers Instead of Warehousemen

In the Docket No. EP 754 oversight proceeding, several participants expressed concerns about the impact of demurrage on third-party intermediaries who handle goods shipped by rail but have no property interest in them (also commonly known as warehousemen, as noted above) following the Board's adoption of the final rule in Demurrage Liability, Docket No. EP 707 (codified at 49 C.F.R. part 1333).⁵⁹ Participants raised concerns that the rule adopted in Docket No. EP 707 led rail carriers to impose demurrage charges on warehousemen who lack control over the timing or volume of railcars shipped to them and have no business relationship with rail carriers to facilitate the resolution of demurrage disputes.⁶⁰

Commenters suggested shipper-direct billing as one potential solution but stated that warehousemen and shippers have been unable to reach such agreements with rail carriers.⁶¹ At least one rail carrier has reportedly taken the position that the rule adopted

⁵⁹ In Docket No. EP 707, the Board explained that a question had arisen as to who should bear liability when an intermediary that detains rail cars too long is named as consignee in the bill of lading but asserts that it either did not know of its consignee status or had affirmatively asked not to be named as consignee. Demurrage Liability Final Rule, EP 707, slip op. at 4. The Board noted that there was a split on that issue in the U.S. Courts of Appeals. Id. The Board determined that identification of a party in the bill of lading was not controlling for purposes of demurrage liability. Id. at 14. The Board adopted “a conduct-based approach to demurrage in lieu of one based on the bill of lading,” id. at 15, based on “the theory that responsibility for demurrage should be placed on the party in the best position to expedite the loading or unloading of rail cars at origin or destination,” id. at 8.

⁶⁰ See, e.g., International Liquid Terminals Association (ILTA) Comments 1-2, May 8, 2019; Kinder Morgan Terminals (Kinder Morgan) Comments 8-9, May 8, 2019.

⁶¹ ILTA Comments 2, May 8, 2019; Kinder Morgan Comments 2-3, June 6, 2019.

in Docket No. EP 707 precludes rail carriers from entering such agreements and requires them to bill and hold warehousemen solely responsible for demurrage on delivered cars.⁶²

The rule adopted in Docket No. EP 707 does not require rail carriers to bill warehousemen, nor does it preclude a rail carrier from sending demurrage bills directly to the shipper, or from looking to the shipper as the responsible party for any unpaid assessments. The Board notes, in particular, that the rule adopted in Docket No. EP 707 states, in permissive terms, that parties who receive cars “may be held liable for demurrage,” see 49 C.F.R. § 1333.3 (emphasis added), and that the Board expressly stated that the demurrage liability rules promulgated in that docket “are default rules only, meant to govern demurrage in the absence of a privately negotiated contract.”

Demurrage Liability Final Rule, EP 707, slip op. at 25. Nor should rail carriers be able to hold warehousemen responsible when a shipper that has agreed to accept responsibility for demurrage does not pay.⁶³ In Demurrage Billing Requirements, Docket No. EP 759, served concurrently with this decision, the Board is proposing rules that will further address these matters, in addition to the invoicing issues noted above. In the meantime, the Board encourages railroads to work collaboratively with warehousemen and shippers to address these issues.

General Concluding Considerations

The Board concludes by restating two fundamental principles that all rail carriers, and all shippers and receivers, are encouraged to keep in mind. First, demurrage rules

⁶² See Kinder Morgan Comments 10-11, May 8, 2019; Kinder Morgan Comments 1-2, June 6, 2019.

⁶³ The shipper is, after all, the party shown on the bill of lading, and indeed the one that was historically responsible for demurrage.

and charges are not reasonable when they do not serve to incentivize the behavior of shippers and receivers to encourage the efficient use of rail assets. In other words, charges should not be assessed in circumstances beyond the shipper's or receiver's reasonable control. It follows, then, that revenue from demurrage charges should reflect reasonable financial incentives to advance the overarching purpose of demurrage and that revenue is not itself the purpose. Second, transparency and mutual accountability by both rail carriers and the shippers and receivers they serve are important factors in the establishment and administration of reasonable demurrage and accessorial rules and charges. These two principles were recognized by rail carriers, shippers, and receivers in connection with the Docket No. EP 754 oversight hearing, and the Board affirms them here.

The Board expects to take all of the principles discussed in this proposed policy statement into consideration, together with all of the evidence and argument that is before it, in evaluating the reasonableness of demurrage and accessorial rules and charges in future cases.

Opportunity for comment. The Board seeks public comment on this proposed policy statement. Comments are due by November 6, 2019. Reply comments are due by December 6, 2019.

Decided: October 4, 2019.

By the Board, Board Members Begeman, Fuchs, and Oberman.

Kenyatta Clay,

Clearance Clerk.

Participants in Docket No. EP 754

The Board received comments and testimony from the following parties in Docket No. EP 754. For parties that provided testimony at the May 22-23, 2019 hearing, the panel is noted in parentheses. Pre-hearing comments are denoted with “*” and post-hearing comments are denoted with “†”.

- Ag Processing Inc*[†] (Panel VI)
- Agricultural Retailers Association (ARA)* (Panel VI)
- Agricultural Transportation Working Group*⁶⁴
- Agricultural Transportation Working Group^{†65}
- All South Warehouse D/C, Inc.[†]
- American Chemistry Council*[†] (Panel VIII)
- American Forest & Paper Association*
- American Frozen Food Institute*
- American Fuel & Petrochemical Manufacturers*
- American Plant Food Corporation*
- American Short Line and Regional Railroad Association[†]
- ArcelorMittal USA LLC*
- Archer Daniels Midland Company*

⁶⁴ Submitted on behalf of ARA, Amcot, American Farm Bureau Federation, American Frozen Food Institute, American Soybean Association, Corn Refiners Association (CRA), Cotton Growers Warehouse Association, Cotton Warehouse Association of America, Cottonseed & Feed Association, Growth Energy Institute of Shortening and Edible Oils, National Barley Growers Association, National Cotton Council, National Cotton Ginners Association, National Cottonseed Products Association, National Council of Farmer Cooperatives, National Farmers Union, National Grain and Feed Association (NGFA), National Oilseed Processors Association (NOPA), National Sorghum Producers, North American Millers’ Association (NAMA), The Fertilizer Institute (TFI), U.S. Canola Association, and U.S. Wheat Associates.

⁶⁵ Submitted on behalf of ARA, American Bakers Association, American Cotton Shippers Association, American Farm Bureau Federation, CRA, Cottonseed & Feed Association, Cotton Warehouse Association of America, Growth Energy Institute of Shortening and Edible Oils, National Association of State Departments of Agriculture, National Association of Wheat Growers, National Cattlemen’s Beef Association, National Corn Growers Association, National Cotton Council, National Cotton Ginner’s Association, National Cottonseed Products Association, National Council of Farmer Cooperatives, National Farmers Union, NGFA, National Grange, National Milk Producers Federation, NOPA, National Pork Producers Council, National Renderers Association, NAMA, TFI, and U.S. Wheat Associates.

- Arizona Electric Power Cooperative, Inc. and Freight Rail Customer Alliance*[†] (Panel XII)
- Armada Supply Chain Solutions, LLC*
- Association of American Railroads[†]
- Auriga Polymers, Inc., a wholly owned subsidiary of Indorama, NA, on behalf of Indorama Ventures affiliates* (Panel VII)
- Barilla America, Inc.* (Panel IX)
- BNSF Railway Company*[†] (Panel XI)
- Brainerd Chemical Company, Inc., on behalf of itself and other members of the National Association of Chemical Distributors* (Panel IV)
- Brunk Plastic Services* (Panel VII)
- Bunge North America*[†] (Panel I)
- California League of Food Producers*
- Canadian National Railway Company*[†] (Panel XI)
- Canadian Pacific Railway Company*[†] (Panel XI)
- Cargill, Inc.* (Panel IV)
- Consolidated Scrap Resources, Inc.*[†] (Panel I)
- Corn Refiners Association (CRA)* (Panel VI)
- Covia Holdings Corporation*
- CSX Transportation, Inc.*[†] (Panel II)
- Diversified CPC International, Inc.* (Panel VIII)
- Dow, Inc.*
- Energy Transfer*
- Federal Maritime Commission* (Panel III)
- Glass Packaging Institute*
- Global Harvest Foods*
- Grain Craft*
- Growth Energy*
- Hudson Terminal Rail Services*
- Imerys USA, Inc.*
- Industrial Minerals Association - North America*
- Institute of Scrap Recycling Industries, Inc.*[†]
- Intermodal Motor Carriers Conference[†]
- International Association of Refrigerated Warehouses* (Panel X)
- International Liquid Terminals Association* (Panel X)
- International Paper* (Panel IV)
- International Warehouse Logistics Association*[†] (Panel X)
- Kansas City Southern Railway Company*[†] (Panel VIII)
- Kinder Morgan Terminals*[†] (Panel I)
- Lansdale Warehouse Company*
- Lhoist North America* (Panel V)
- Louis Dreyfus Company LLC*
- Lyondell Chemical Company, Equistar Chemicals LP, and LyondellBasell Acetyls, LLC*

- Martin-Brower Company, LLC*
- MHW Group, Inc. and its companies, Cryo-Trans, Inc., Perryville Cold Storage and Chambersburg Cold Storage*[†] (Panel V)
- MillerCoors LLC* (Panel IV)
- National Coal Transportation Association* (Panel XII)
- National Customs Brokers and Forwarders Association of America, Inc.*
- National Grain and Feed Association (NGFA)*^{†66} (Panel VI)
- National Industrial Transportation League*[†] (Panel VII)
- Norfolk Southern Railway Company*[†] (Panel II)
- Normerica Inc. and Northdown Industries Inc.* (Panel IX)
- North America Freight Car Association*[†]
- North Dakota Grain Dealers Association*
- Olin Corporation*[†] (Panel I)
- Oxbow Carbon LLC*
- Packaging Corporation of America* (Panel IV)
- Palmer Logistics* (Panel V)
- PBF Energy Inc. and PBF Logistics* (Panel XII)
- Peabody Energy Corporation*
- Portland Cement Association[†]
- Private Railcar Food and Beverage Association, Inc. (PRFBA)*[†] (Panel IV)
- R. D. Gould*
- Rebel Oil Company, Inc. and Pro Petroleum, Inc.*
- Reserve Management Group*
- San Jose Distribution Services Inc.*
- San Jose Distribution Services Inc., Kenco, RBW Logistics, Palmer Logistics, CDS Transportation, Acme Distribution, Total Distribution Inc., Verst Group Logistics Inc., Sonwil Distribution Center, Peoples Services, Lansdale Services Inc., Logistics Services Inc., PRFBA, Stech Group, The Shippers Group, RGL Logistics, Moran Logistics, Wagner Logistics[†]
- Shea Brothers Lumber Handling, Inc.*
- Sims Metal Management Limited and SA Recycling* (Panel IX)
- Star Distribution[†]
- Sysco Corporation*
- The Anderson-DuBose Company* (Panel V)
- The Fertilizer Institute (TFI)*[†] (Panel VII)
- The Shippers Warehouse Co., dba The Shippers Group (The Shippers Group)*[†] (Panel V)
- UGI Energy Services, LLC*
- Union Pacific Railroad Company*[†] (Panel II)
- U.S. Clay Producers Traffic Association, Inc.*

⁶⁶ Pre-hearing comments supported by members of NOPA, North America Freight Car Association, and NAMA.

- U.S. Department of Agriculture*
- Valley Distributing & Storage Company*
- Verso Corporation*
- Western Coal Traffic League*[†] (Panel XII)

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